PUBLIC PROSECUTOR

v.

NG TECK HONG & ANOR.

HIGH COURT MALAYA, MUAR
RICHARD TALALLA JC
[CRIMINAL TRIAL NO. 58-2 OF 1988]
25 JANUARY 1990

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Heroin found hidden beneath seat of child's tricycle - Legal/actual possession of premises - Lawful guardian having custody and control of child's tricycle - Whether there was evidence of other persons occupying the premises - Whether conduct of accused consistent with innocence - Rebuttal of presumption - Sections 37(b), 37(d), 37(da), 37(g), 39B(1)(a), 39B(2) of the Dangerous Drugs Act 1952, s. 5 of the Guardianship of Infants Act 1961, s. 51 Criminal Procedure Code, s. 114(g) Evidence Act.*

A police party laid an ambush and arrested the 1st accused after a brief struggle. The police officers were dressed in plain clothes. The 1st accused stopped struggling when the police identified themselves. He was taken to his house where his wife (2nd accused) and 2 year old child were staying. Drugs were found hidden beneath the seat of the child's tricycle which was in the hall of the house, which had 3 bedrooms. There was no attempt by either of the accused to take the tricycle away and dispose of the drugs. Nail clippings taken from both the accused showed no trace of heroin. The 1st accused became pale and started sweating when drugs were discovered from the child's tricycle. In her cautioned statement the 2nd accused said that she knew that the police had discovered dadah beneath the seat of the child's tricycle when they searched the house. The main defence of the 1st accused was that there were others including those occupying the house who could have had access to the tricycle. It was further contended that besides the 1st and 2nd accused and the child, the mother of the 1st accused and a couple named Ah Kok and Lai Heong were also occupants of the house at the material time.

Held:

[1] There was no evidence pointing to the 2nd accused having control or management of the premises and she was arrested because she happened to be in the house when the drugs were discovered.

[2] The cautioned statement of the 2nd accused did not appear to incriminate her in anyway because she was all the time in the hall and would have witnessed the discovery by the police of the drugs in the compartment of the tricycle.

[3] Although the 2nd accused was the one who bought the tricycle for the child, it was the 1st accused who had custody and control of the tricycle as lawful guardian and owner of the child's property. There was no evidence that the 2nd accused reserved ownership and possession of the tricycle for herself.

[4] A *prima facie* case had not been made out against the 2nd accused upon which she should be called to answer - (acquitted and discharged at the end of the prosecution's case).

[5] Even if some of the witnesses who testified as to the occupancy of the house were to be regarded as partisan, there was still the testimony of the neighbour which could not be considered to be anything other than independent.

[6] There was no attempt to take the tricycle away and dispose off the drugs and that omission was point consistent with innocence.

[7] The absence of anything incriminating in regard to the nail clippings was yet another factor pointing to the innocence of the accused.

[8] The granulous substance recovered from the 1st accused in the ambush was not proven to be drugs within the meaning of the act and did not form the subject matters of the charge and was to be totally disregarded.

[9] In respect of the whole case the trial Judge does not have to believe the explanation of the accused but simply to consider whether the evidence raised a reasonable doubt as to his guilt.

[10] On the facts of this case, it was reasonably probable that there were a number of occupants in the house at the material time, that the drugs found in the tricycle were not the property of the accused, that he was not in possession of, and had no knowledge of the drugs, that the drugs could have been the property or in the possession of one or more of the occupants of the house and there was reasonable doubt in regard to the guilt of the accused.

[Acquitted and discharged.]

Cases referred to:
Mat v. Public Prosecutor [1963] MLJ 263
Public Prosecutor v. Raymond Chia Kim Chwee & Anor. [1985] CLJ (Rep) 260
Illian & Anor. v. Public Prosecutor [1988] 1 MLJ 421
Wong Chooi v. Public Prosecutor [1967] 2 MLJ 180
Public Prosecutor v. Mohamed Noor Jantan [1979] 2 MLJ 80
Tai Chai Keh v. Public Prosecutor [1948-49] MLJ Supp 105

Legislation referred to:
Criminal Procedure Code, s. 51,
Dangerous Drugs Act 1952, ss. 37(b), 37(d), 37(g), 39B(1)(a), 39B(2)
Guardianship of Infants Act 1961, s. 5
Evidence Act 1950,s.114illus.(g)

For the prosecution - Saufee Afandi (DPP)
For the accused person - Teh Poh Teik; M/s. Abdul Raman Saad & Associates

JUDGMENT

Richard Talalla JC:

In this trial the accused Ng Teck Hong and Lim Kek were charged as follows:

> That you on 14 October 1986 at about 10.00 p.m. at house number 84, Jalan Tenggiri, Taman Banang, Batu Pahat, in the District of Batu Pahat, in the State of Johor Darul Takzim did jointly traffic on your own behalf a dangerous drug, to wit 29.72 grammes of heroin and thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 39B(2) of the said Act.

On 14 October 1986 at about 7.30 a.m. a police party led by ASP Ismail laid an ambush at a village situated at 3½ milestone Jalan Kluang, Batu Pahat. A motor cyclist arrived. One of the ambush party caught hold of the motor cycle which fell whereupon the motor cyclist was apprehended. He was Ng Teck Hong the 1st accused. The ambush party were in plain clothes and it was quite dark and there were lots of trees and bushes. The 1st accused was

surprised. There was a slight struggle. ASP Ismail identified himself as a police officer whereupon the 1st accused did not struggle anymore. It all happened very quickly. The 1st accused was then searched and allegedly found to have in his trouser pocket a packet wrapped in Chinese newspaper the contents of which contained a reddish substance. The 1st accused was taken by the ambush party to the Batu Pahat Police Station. At about 9.30 the same night the ambush party with the addition of a woman constable led by the 1st accused went to a house, No. 84 Jalan Tenggiri, Taman Banang, Batu Pahat. It was a single storey residential house which was subsequently discovered to have been let to the 1st accused under a written contract at a rental of RM350 per month. The house was pointed out to ASP Ismail by the 1st accused. There was a fence in front of it and a gate leading to the compound of the house. The gate was closed but not locked. There was a dog tied to the gate. In the garage in front was a Toyota Corona motor car which was later discovered to be registered in the name of the 1st accused. The police party divided themselves some proceeding to the rear of the house in case someone ran out of the house. The door of the house was open but the grill to the door was locked. ASP Ismail saw a woman, who subsequently turned out to be the 2nd accused, with a baby on a chair in the hall. He identified himself as a police and instructed her to open the grill, pointing out the 1st accused to the woman. The accused talked to each other in Chinese whereafter the 2nd accused went to a room adjacent to the hall and returned bringing a key and opened the grill. ASP Ismail accompanied by Detective Corporal Rashid, Detective Corporal Jayaraman, the woman constable and the 1st accused entered the house where a search was carried out. The woman constable searched the person of the 2nd accused but found nothing. Meanwhile ASP Ismail accompanied by the 1st accused and guarded by Detective Corporal Rashid searched the first bedroom of the house but found nothing incriminating. He then claimed to have searched the hall where there was a child's tricycle P4. Beneath the seat of the tricycle was a cylindrical compartment. He checked this container and found that a section of it could be opened. He opened it and there found a package. The package contained newspaper wrappings and inside the wrappings were plastic wrappings. The newspaper was in Chinese characters. In the plastic wrappings he saw some granulous substance that he suspected to be drugs and this substance, so he claimed, was similar to that he found on the person of the 1st accused at the ambush.

Upon taking the packet of powdery substance from the compartment of the tricycle ASP Ismail showed it to the two accused and asked them what it was. They did not say anything, but the 1st accused looked shocked and kept staring at ASP Ismail who noticed that the first accused was pale and sweating. The 2nd accused was quiet and looked normal to ASP Ismail. She was arrested and handcuffed. A search was then made of the house. It had 3 bedrooms. Standing at the front door of the house and looking into the hall the bedroom (room B) from which the key was taken was to the right. Adjacent to this room and towards the back of the house was the second bedroom (room C). Opposite room C was the third bedroom (room D).

In room C ASP Ismail found a single bed and an almeirah. The flooring of the room was a raised wooden platform. He noticed the room was empty except for the bed and the almeirah. He made a search of the room including the almeirah. He did not find any drugs in this section of the house. The almeirah contained clothes and blankets, children's clothes, men's and women's clothings. They were not placed neatly in the almeirah. The clothing was crumpled up and put into the almeirah. ASP Ismail observed that one or two pieces of clothing were hanging in the almeirah. He did not notice any clothing outside the almeirah in room C.

There were no towels, shoes or slippers in this room nor were there photographs hanging on the wall. ASP Ismail did not find any identification documents nor personal effects with names in room C. ASP Ismail then went into the kitchen. There was a refrigerator in the kitchen on top of which ASP Ismail found more than 50 pieces of empty plastic packets. In the third bedroom, room D, he found a double bed and an almeirah. The room looked clean. There were no pictures on the wall, no clothings. He searched the room and the almeirah but did not find drugs or anything suspected to be drugs. In the almeirah were men's and women's clothings, pillows, covers, bedsheets and blankets. ASP Ismail did not find identification papers or documents in room D. There were no photographs, shoes, slippers or towels.

When ASP Ismail made these various searches the 1st accused was with him as was Detective Corporal Rashid. Detective Jayaraman was guarding the 2nd accused who was in the hall throughout the search. ASP Ismail made a search list wherein he recorded 2 items only namely one big plastic packet containing granulous substance suspected to be heroin and in the column of the list entitled "Mana dijumpai", he wrote children tricycle SP compartment under the seat. The second item he recorded in the search list was one piece and 2 pieces of Chinese newspaper cuttings and under the said column he wrote "in bedroom". The 1st accused was required to sign the search list and he did so but the 2nd accused was not so required and did not sign the search list.

ASP Ismail stated that there were other things, cash RM1,202, empty plastic, NRIC of the 2nd accused.

Meanwhile at about 10.55 p.m. Inspector Sahat came to house. He was followed by a police photographer who arrived at about 11.20 p.m. The photographer took photographs of the house from the outside. He also photographed the hall and the tricycle. He did this on the instruction of ASP Ismail. Unfortunately no photographs were taken of any of the bedrooms, the bedrooms being rooms B, C and D.

It was about 12.15 a.m. on 15 October 1986 before ASP Ismail returned to his office. Before leaving the house he asked the 1st accused for his relative's telephone number for him to hand over the child. He was given a number which he dialled and on receiving the call he handed it to the 2nd accused. The 2nd accused talked into the telephone. ASP Ismail told her to tell the person to take the child away and then the 2nd accused spoke in the phone.

At 12.30 a.m. they left the house and on reaching the police van in front of the house the 2nd accused handed the child to a Chinese lady.

ASP Ismail testified that while he was in the house nobody came to it. He further testified that he found no other persons in the house apart from the 1st and 2nd accused and that he did not come across any evidence to indicate that anyone else was staying in the house other than the two accused and the child. He added that aside from the motor car which he found in the porch he did not find any other vehicles there nor were there cars or vehicles parked near the house or vicinity of the fence. He testified that he did not find any old lady during his searches of the house. He added that he found no identification of any business being carried on in the house. There were no plastic containers for drinks. There was no sugar-cane crusher or push-cart. He said that in his experience as an anti-drugs officer, drugs are normally packed in plastic straws or plastic packets, for small amount plastic straws, for bigger amount plastic packets. He added that the drugs are in packets, pieces of paper are used to wrap up the plastic packets.

The 2nd accused had made a statement after being duly cautioned pursuant to the provisions of s. 113 of the Criminal Procedure Code. The statement was admitted in evidence without objection. In her statement the 2nd accused said that on 14 October 1986 at about 7.15 at night she had just returned from Johor Bahru by taxi, that upon arriving at her house at Jalan Tenggiri she took a bath, that thereafter she rested in her room, that on the same day, as to the time she was not sure, her husband returned with several police personnel and that she observed that her husband was handcuffed. She added that she suspected that her husband was caught by the police. She went on to say that her husband asked her to open the door which she did, that after that the police officer requested her to sit down in the hall with her small child, that thereafter the police searched things in the house. She said at the time they were carrying out the search her husband was asked to follow them to observe them carrying out the search, that thereafter the police handcuffed her and brought her to the police station. She added that they said that she was arrested and that she did not know why she was arrested by the police. The recording officer than asked her whether she knew when the police searched her house they found dadah in the house. She answered that she knew. She was then asked where they found those drugs. She replied that they found those drugs concealed beneath the seat of the basikal mainan belonging to her small child. The recording officer then asked her who bought 'basikal mainan itu'. The 2nd accused replied that she was the person who bought it. She said that she was not a drug addict. She added that her husband was not a drug addict. She was asked whether she wanted to say anything else. She said that she did not. She was finally asked whether what was given in the statement was true and she replied in the affirmative.

The owner of the house gave evidence. He produced a tenancy agreement between himself as landlord and the 1st accused as tenant. He had entered into this agreement with the 1st accused in 1983 and he renewed it on 13 August 1986. The rental was RM320 per month. The landlord testified that he saw the mother of the accused sometime in 1985 staying in the house. He said he visited the house once in 4 to 5 months. He testified that over the 3 years of tenancy he had gone to the house not more than 20 times, that he saw the mother in the house about 4 times, that he did not see her every time he went to the house, that she had introduced herself and that is when he came to know she was the mother of the 1st accused. He added that she did not tell him where she was staying. The landlord also testified that apart from the 2nd accused and the child and the mother he saw some of the accused's friends in the house. He saw the accused's friends in the house about 2 to 3 times. He was not aware whether they were the same persons each time. When he saw the friends of the accused they were sitting in the hall. The friends were male. There were 2 or 3 of them. He was not sure as to whether one of the rooms of the house had been rented out.

ASP Ismail testified that the 2nd accused was arrested because she was in the house and that if any other adult was in the house he would have also arrested that person. It was he who recommended that the 2nd accused be charged. He testified that the basis of his recommendation and the only reason for the recommendation was that the 2nd accused was also in the house. The 2nd accused was not required to and did not sign the search list. Nothing was known about the financial affairs of the 2nd accused. ASP Ismail testified that he was more concerned with the 1st accused and that the source of his information was in regard to the 1st accused. ASP Ismail testified that he did not tell the 2nd accused why he was arresting her. He did however tell the 1st accused why he was arresting him - because of pek hoon. When the drugs were discovered in the cylindrical compartment of the tricycle the 2nd accused was present. ASP Ismail testified that he showed the drugs to both the accused at the same time. That was also the time when he told the 1st accused that he was arresting him because of pek hoon and at that time the 2nd accused was there.

At the police station nail clippings of all the fingers of both accused were taken. These clippings were sent to the chemist at Johor Bahru for examination for the presence of drugs in particular heroin. They were duly examined. No heroin was found to be present in respect of the clippings.

The prosecution had in aid a number of presumptions set out in the act under which the accused were charged, which presumptions so far as they apply to this case are set out as follows:

Section 37(b) a person, until the contrary is proved, shall be deemed to be the occupier of any premises, if he has, or appears to have, the care or management of such premises.

Section 37(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

Section 37(da) any person who is found in possession of (i) 15 grammes or more in weight of heroin, otherwise than in accordance with the authority of this act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug.

Section 37(g) if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises.

Upon the close of the prosecution case Counsel for the accused made a submission that the prosecution had not made out a case under the offence charged upon which either of the accused should be called upon to answer.

In regard to the 1st accused the prosecution had established that he was the lawful tenant of the premises pursuant to a written tenancy agreement executed between the owner of the house as landlord and the 1st accused as tenant whereunder the 1st accused was required to pay a rental of RM320 per month. There was evidence by way of rent receipts that the 1st accused did pay the rental. That being the case it seemed to me that the prosecution had established that he as the lawful tenant had legal possession of the premises. It was the 1st accused who led the police to the house where his car was found in the porch. There was a dog at the gate and there was no evidence that it barked or was hostile. The wife of the 1st accused was in the house as was his child. It was part of the case for the defence and repeatedly put to prosecution witnesses that the mother of the 1st accused also lives in the house as did a couple, male and female, respectively called Ah Kok and Lai Heong. What is more the landlord testified that he saw the 1st accused on the premises when he visited the same from time to time. On these facts it appeared to me that the prosecution had also established that the 1st accused besides having legal possession, also had actual possession of the premises from which it had to follow, in the absence of evidence to the contrary, that he the 1st accused had the care and management of the premises. Thus to my mind the presumption under s. 37(b) arose and operated against the 1st accused and he had to be deemed to be the occupier of the premises. It followed that the presumption under s. 37(g) arose and the 1st accused had to be presumed to have knowledge of the drugs concealed in the premises.

As to the 2nd accused the prosecution evidence was that she was arrested simply by reason of the fact of her presence at the premises. She was not even required to sign the search list which was made up by ASP Ismail. Her statement to the police did not appear to incriminate her in any way. In the statement she acknowledged that the 1st accused was her husband and that the child Wong Chet Ting was her child. In any event the prosecution produced in evidence a birth certificate evidencing that the parents of the child were the 1st and 2nd accused. It is true that in her statement the 2nd accused referred to the house as being her house and to the room she rested in as being her room. To my mind that was only a manner of speaking, a family description, such as even a child would describe the house that the child lives in as her house and the room she sleeps in as her room. There was no evidence pointing to the 2nd accused having control or management of the premises an accordingly I found that the presumption under s. 37(b) could not be said to operate against and it had to follow that the presumption under s. 37(g) likewise had to remain dormant as far as the 2nd accused was concerned.

In regard to the presumption laid down in s. 37(d), the drugs were found in the container beneath the seat of the tricycle. My inspection of the container disclosed that it was built for and apparently came with the tricycle. Thus is was part and parcel of the tricycle, the tricycle which was the plaything of the child. In a manner of saying the tricycle was the child's and belonged to her. But she being a child could not have the legal ownership of the article. Pursuant to s. 5 of the Guardianship of Infants Act 1961 it was the father of the child that is to say the 1st accused who is the guardian of the child and the owner of the child's property. Apart from this the view I took was that as between the father and the mother the father had the custody and control of the tricycle. Furthermore, he having the care and management of the premises and in the absence of anything else it had to follow that he had the custody and control of the contents of the premises which of course included the tricycle. It is true that it was the mother who bought the tricycle for the child but there was no evidence that she reserved ownership and possession of it for herself nor was there anything from which it could be inferred that she did so. It would have been quite extraordinary if she did. Such being the evidence I found that the presumption under s. 37(d) did not apply to the 2nd accused but that it did against the 1st accused.

In her cautioned statement the 2nd accused said she knew that when the police searched the house they found dadah in the house. To my mind there was nothing incriminating about that statement because the 2nd accused was all the time in the hall and would have witnessed the discovery by the police of the drugs in the compartment of the tricycle. What is more, according to ASP Ismail, upon discovery of the drugs, he showed the drugs to both the accused. Hence her admission of knowledge.

The 2nd accused was quiet and looked normal when the drugs were found. It was admitted by ASP Ismail that the 2nd accused was arrested simply because of the fact she happened to be in the house. He testified further that if there was anyone else in the house that person too would have been arrested, implicitly by reason only of the fact of that person's presence in the house. The second accused was not told why she was arrested.

On the evidence adduced by the prosecution I found that the prosecution had not made out a *prima facie* case against the 2nd accused upon which she should be called to answer. Therefore I acquitted and discharged her.

As to the 1st accused, as I said, I found that the presumptions under s. 37(b), (d) and (g) applied against him. The prosecution had sent the substance found in the container of the tricycle to a qualified chemist who discovered it to be heroin. Every link in the movement of

the substance in question from the time it was discovered to the time it was produced in Court was established in evidence. The chemist had found the substance to be 29.72 grammes in weight giving every benefit to the accused. Thus it followed that as against the 1st accused the presumption under s. 37(da) also applied and a *prima facie* case made out. Accordingly I called upon him to make his defence.

The 1st accused, whom I shall now refer to as the accused, elected to give evidence on oath. His wife, the 2nd accused since acquitted, gave evidence in his defence as did his neighbour one Ng Kim Chew, a servant Lim Ah Hiok, Ng Yok Mui the sister of the accused and his step-mother Tan Hoon.

In his evidence the accused said that on 14 October 1986 he was working as a captain in a massage parlour and that he was also a part time broker earning an overall income of more than RM1,000 to RM2,000 per month, that his wife was working in a massage parlour in Johor Bahru as a masseuse with an income of about RM2,000 to RM3,000 per month. He admitted that the motor car JBK 8208 was registered in his name, he having obtained the money to buy it from their joint income. He admitted he was the tenant of the house paying a rent of RM350 per month.

The accused testified that when he was arrested he did not have anything on him.

The accused said that when ASP Ismail and his police party arrived at the accused's house on 14 October 1986 his wife opened the door, that his mother was in the house, and had been staying in room C of the house for about 3 months before that. He confirmed the search of the house by ASP Ismail but said that it was not ASP Ismail who discovered the drugs in the tricycle, that he was in the kitchen with ASP Ismail at the time. The accused confirmed that at the request of ASP Ismail his wife rang up to make arrangements for someone to take care of the child and that his father's third wife named Tan Hoon whom he described as his third mother came to take the child. The accused testified that his mother too was arrested and taken to the police station along with him and his wife, that ASP Ismail then took pity on her and released her, sending her back to the accused's house with one of his men and that he had instructed the mother to come back to his office the next day. The accused contended that at the police station both he and his wife were wearing items of jewellery which they handed to the mother to take home. The accused testified that the next day his sister took the mother back to the police station to collect her identity card, that there they met ASP Ismail and thanked him for his help (terima kasih, banyak tolong). In reply, so the accused testified, ASP Ismail said that he did not help her but that he pitied her (saya tidak tolong, saya kesian sama dia). The defence added that ASP Ismail accompanied by one of his men drove the sister and the mother back to the accused's house in the sister's car and there conducted a second search of the house when he recovered the birth certificate of the child and a wrist watch belonging to the 2nd accused, that he retained the birth certificate but handed the watch to the sister.

The accused testified with reference to the sketch plan Exhibit P2 that he occupied room B together with his wife and child.

The accused went on to testify that in October 1986 when the police raided the house there was no bed in room C, that his mother slept on a single mattress, that there was no cupboard in room C but there was a dressing table. His mother, so he testified, put her clothes beside the place where she slept.

The accused stated in evidence that before room C was occupied by his mother it was rented out to a couple called Ah Leong and Choong Lan, that Choong Lan was nicknamed Ah Loke, that she was also a massage parlour girl and her number was 6 that is why she was called Ah Loke.

The accused said in evidence that on 14 October 1986 and for more than one year prior thereto he had been renting room D to a couple called Ah Kok and Lai Heong at a rental of RM120 per month and that he had informed ASP Ismail about this when on 14 October 1986 he was arrested. He described room D as having a double bed, a cupboard/wardrobe and a dressing table. He testified that ASP Ismail when searching room D took a photograph from the dressing table which the accused told him was the photograph of Lai Heong in reply to ASP Ismail's inquiry as to who the person was. He said that Ah Kok and Lai Heong could be said to be husband and wife but he did not know if they were legally married. Ah Kok was a Singaporean. He was unemployed but Lai Heong worked as a massage girl in Johor Bahru with the wife of the accused. The accused testified further that the neighbours would have known of the existence of this couple and apart from the neighbours the relatives of the accused would also have known of their existence. The accused added that his neighbour one Ng Kim Chu also knew of the existence of this couple. Ng Kim Chu whom he called Ah Soh occupied house No. 28 Jalan Tenggiri where she ran a hawker business which Ah Kok and Lai Heong and the 1st accused patronized.

The accused testified that before his arrest in 1986 he had engaged one Ah Keok to look after his mother. This was corroborated by his wife and further corroborated by the servant herself Lim Ah Hiok.

He added that his mother was 70 years old and at that time was sick, suffering from diabetes and having heart trouble. He said that his mother passed away in 1988.

The accused testified that in October 1986 he and his wife moved about frequently with Ah Kok and Lai Heong. They had common friends who came to the house where they gambled, sometimes staying overnight where they slept in the hall or in Ah Kok's room. All of them moved about freely in the hall, kitchen and bathrooms of the house.

The accused confirmed in evidence that the tricycle was bought by his wife for their daughter. He said it was normally kept in the hall and not in the bedroom. He swore that he did not conceal the drugs nor did he know that they were concealed in the tricycle and that the 53 empty plastic packets did not belong to him.

The accused was cross-examined but in no way did he contradict himself nor breakdown.

The second witness for the defence, Lim Kek the wife of the accused corroborated the testimony of her husband in regard to the existence of occupancy in the house including the mother of the accused staying there at the time of arrest and for some months prior thereto, Lai Heong working with her, the mother of the accused being also arrested and brought to the police station on 14 October 1986, the three of them being present at the lock-up of the police station with ASP Ismail whom she described as saliating, meaning 3 stars, who then directed one of his officers to send her mother back home. The wife testified that her jewellery items were kept by ASP Ismail who then handed them back to her telling her to hand the same in turn to her mother-in-law for safe keeping, which she did. In cross-examination she confirmed that she was working in Johor Bahru and came back once fortnightly or once a month, that it was her husband who came back to the house daily and that compared to her, her husband was the one who took care of the child most of the time.

The third witness for the defence, Ng Kim Chu the neighbour of the accused, appeared in every respect to be an independent witness. She testified that she knew the accused and his wife, that in October 1986 they were her neighbours, that she stayed in No. 82, Jalan Tenggiri, and that in October 1986 the mother of the accused was staying with him. She added that the house of the accused had three rooms. She knew the accused rented out a room to a couple. She did not know their names but had seen them before because they used to buy bee hoon and mee siam which she sold in front of her house. The accused and his wife from time to time brought their daughter to buy kueh from her. This witness testified that the mother of the accused one day told her that she, her son and daughter-in-law were arrested the previous night but that she the mother was released in the morning because she was sick. The neighbour went on to testify that two or three days after the mother had told her of the arrest a lorry came to the accused's house and picked up things therefrom. She saw the man and the lady who were renting the accused's room, and the mother was there and informed her that these persons were shifting out. As to the presence of the mother in the house this witness said that sometimes she was there and sometimes she was not. This witness testified to seeing her there always but not asking her whether she was actually staying there all the time. She said further in evidence, in cross-examination, that there was a lady washing clothes for her, cooking for her, that this old lady walked very slowly, her eyesight was no good and that she was now dead.

The fourth witness for the defence, Lim Ah Hiok was the lady who took care of the mother of the accused. Her testimony was to the following effect. When she was young she stayed in the same area as the mother. The accused asked her to look after her because she was not in good health and the accused was afraid that his mother would fall down. She was suffering from diabetes and high blood pressure. She looked after the mother for 3 months. She was paid RM200 per month to do so. The mother was staying with the accused at the time. The witness cooked for the mother, served her food and gave her medicine. She worked there from 7.00 a.m. to 6.00 p.m. The accused had rented the back room to a man called Ah Hok who occupied it with his cha boh (girlfriend, lady). She seldom met the lady in the house. When the accused was arrested she was still looking after the mother and the room was still rented out to Ah Hok. In cross-examination she testified as follows: Prior to the accused's arrest she knew him for quite a few years. The mother went to her other son's house during the day time and she had to accompany the mother everytime she went out. The mother did not stay overnight. The mother had a few other sons. Prior to staying with the accused she did not know with which sons the mother stayed. She did not know whether the accused's mother took drugs like opium or heroin to suppress her pain. It was put to her that the mother was not staying on the day in question with the accused. She said that she was. Asked why Ah Kok's girlfriend was seldom in the house, she replied because when she was working there she seldom met her. This witness was asked what time of the day she saw Ah Kok's girlfriend in the house. She replied 5.00 to 6.00p.m. Asked whether the girlfriend stayed overnight she answered that she did not know as she went back at 6.00 p.m. She was further asked whether the girlfriend would come back just before she left the house. She said yes. To a question whether Ah Kok was in the house most of the time, she answered yes. She did not know whether Ah Kok was working. The witness was questioned as to what Ah Kok was doing in the house. She replied that she did not know and added that he was a man. Questioned as to what she meant by that the witness answered that she was an old lady and was working there and had to look after another lady and she did not bother about the business of other. She also testified that Ah Kok locked himself in the room most of the time. The witness was asked, how many times the accused's wife came

home. She replied that she saw the accused's wife 5 to 6 times and that whenever she came back she would stay for 3 or 4 days. Asked whether the accused came back daily to the house she said yes, he normally came back at 12.00 to have lunch, and dinner at 5.00 to 6.00p.m. and she added that she did not know what time he came back at night to sleep. She testified further that the accused's daughter was in the house. To a question as to who took care of the accused's daughter she replied that it was the accused's mother-in-law. The witness denied, when it was put to her, that she was lying. It was put to her that it was the accused who took care of the child. She replied that the child was taken care of by accused's mother-in-law after the arrest and before the arrest it was the accused who took care of her. This witness further testified that the accused used to play with the child. The child sometimes played with the tricycle. She was not aware if others in the household played with the tricycle. She did not know whether Ah Kok took the tricycle into his room.

The fifth witness for the defence, Ng Yeok Mui was the sister of the accused. She confirmed in evidence that on 14 October 1986 her mother was staying with the accused. She testified further thus. Prior to the accused's arrest she always visited his house. There were 3 rooms in his house. Apart from the accused and his mother he had rented a room to Ah Kok and Lai Heong. Ah Kok and Lai Heong always visited her house to play mahjong. On the day after the arrest her mother rang her at about 9.00a.m. and told her that she, the accused and his wife had been arrested by the police the previous night. Her mother asked her to take her to the Anti Dadah Department to collect the mother's Identity Card.

At about 10.00a.m. she picked her mother up in her car and drove her to the Anti Dadah Department. There she met an officer called Ismail. She thanked him for releasing her mother. "Banyak tolong". The officer said it was not because he "tolong" her mother but he "kesian" her. The mother's Identity Card was returned. After that he asked her for the accused's child's birth certificate. She took him in her car to look for the certificate in the accused's house. From the police station to the accused's he drove the car with another police officer. She and her mother were seated at the back. On arrival at the accused's house the officer searched for the birth certificate. He found it in her brother's room. He also searched her mother's room and the back room. Apart from the birth certificate the officer was keen to find a "dacing" (weighing scales) but he did not find any. He searched for about 1 hour and asked her to follow him. The other officer was sitting in the hall. The officer, before they left, asked her mother to hand over all the gold jewellery to her because the mother was old and alone. This jewellery was on her brother when he was arrested. She drove them back to the police station accompanied by her mother. In cross-examination this witness testified that prior to the accused's arrest her mother stayed with the accused for a few months. She could not remember for how many months. Before that the mother stayed with her brother Ng King Hock. He was a teacher. He was the accused's elder brother and the most educated in the family. The mother mostly stayed with Ng Kim Hock and the accused. At first the mother was staying with Ng Kim Hock. She was not on good terms with Ng Kim Hock's wife so she went to stay with the accused. This witness was asked why the mother chose to stay with the accused's wife when most of the time accused's wife was not at home. She answered that her mother had no other place to go because she was not on good terms with the other daughters-in-law. She also testified that the jewellery of her brother comprised a gold chain and a bracelet and his wife's, a chain and bracelet. The accused's daughter was taken care of by his mother-in-law, sometimes by her 3rd mother, and this was so from the very beginning because the accused's wife was working. Most of the time the accused was closer to their daughter. The tricycle was familiar to her because it was always in the brother's house. The accused's daughter used to play with it.

The sixth and last witness for the defence was one Tan Hoon, the step mother of the accused. She testified that the accused could be considered her son. His father had 3 wives. She was the 3rd. She knew the accused's mother. The father has since passed away. In October 1986 the accused's mother was staying with the accused. On the night 14 October 1986 the accused's wife rang her up and requested her to look after the child. She then cycled to the accused's house which was about 5 minutes away. When she arrived she saw many people in the house including the accused, his wife and mother. She did not know what had happened. Ching Foo Lang (Government People) asked her to take the child back to her house. The child was crying. She took the child home. This witness further testified that prior to 14 October 1986 she had been to the accused's house. There were 3 rooms in the house. Apart from the accused, his wife, mother and child there were 2 other persons staying there. They were renting a room. One of them was named Ah Kok and the other Lai Heong. They occupied the room at the rear portion. She had seen them before. The accused's mother occupied the middle room. Before the mother occupied the middle room it was rented out to one Ah Lok who is also known as Pang Choon Lan whom she had met before. She added that she remembered her name as Pang Choon Lan because she had received a letter from her. Pang Choon Lan had rented a room in her house for a few months and paid the rent to her husband. Besides Pang Choon Lan her husband whom she called Ah Loong was also occupying the room. She also testified that Pang and Ah Loong rented a room in the accused's house first. She did not know if they were married but they were staying together. In cross-examination this witness testified that she used to go to the accused's house at his request to fetch the child. She went twice a week. Whenever the accused and his wife were free they would take the child back. It was not regular. In a week the child would be with her most of the time and with the parents at the most 2 or 3 days. Sometimes the accused brought the child to her house. At times both the accused and his wife did so. She knew that the wife of the accused worked in Johor Bahru, came back once a fortnight or a month and that between the accused and his wife it would be the accused who would be with the child more often. She added that the accused's wife paid her RM50 or RM100 for looking after the child and sometimes did not pay her at all. She started looking after the child when it was about 5 months old. The accused's mother was not angry with her when she married accused's father. To a question put to her that she was not on good terms with the accused's mother, she said that she did not agree. The accused's mother had moved in with him for quite sometime. She did not know whether the mother went to the other childrens' houses staying in the accused's house. This witness went on to say that prior to the arrest the middle room was occupied by the accused's mother. The back room was occupied by Ah Kok and Lai Heong. Whenever she went to the accused's house Ah Kok and Lai Heong were there. She knew Lai Heong was working but did not know as what and she did not know what Ah Kok was doing. When shown the tricycle this witness recognised it as the one in the accused's house and which the child played with.

When the accused was apprehended it had to be borne in mind that the ambush party were in plain clothes. It was quite dark. There were lots of trees and bushes. The accused was surprised and there was a slight struggle. ASP Ismail identified himself as a police officer whereupon the accused did not struggle anymore. It all happened very quickly. There was no question of the accused attempting to escape. Thus it could not be said that the accused's reaction could be described as anything but innocent.

As to the packet of substance which the prosecution witnesses claimed to have found on the accused at the time he was stopped on his motorcycle along the path which the accused denied having, neither the packet nor the substance were produced in evidence. No

explanation was given to the Court as to why this evidence was not produced to the Court nor was the Court told what had become of the same. All ASP Ismail could say was that this substance looked like the substance found in the container of the tricycle. There was no evidence that ASP Ismail was a qualified chemist. He could not and did not testify that the substance he claimed to have found on the accused constituted drugs as defined by the act. That substance was not the subject matter of the charge against the accused. Accordingly I disregarded the whole of this evidence as having any incriminating significance.

When the police party arrived at the front door of the house of the accused, the accused spoke to his wife in Chinese whereupon she went to bedroom B, apparently obtained a key, returned, unlocked the front grill of the door and let the police party and her husband in. There was no attempt to take the tricycle away and dispose of the drugs. That omission was a point consistent with innocence.

Likewise in regard to the demeanour of the accused when he was confronted with the discovery of the drugs in the container of the tricycle. He was said to have looked shocked and kept staring at ASP Ismail who noticed he was pale and sweating. To my mind that could have been a normal reaction of a man in whose home in the container of his child's tricycle are found drugs which could lead to his being charged convicted and capitally sentenced for possession thereof.

Paramount to the defence was the contention that there were others including those occupying the house who could have had access to the tricycle. As to the occupancy of the accused's house by his mother and the couple Ah Kok and Lai Heong, even if the evidence of the accused and his wife in this regard could be questioned as being partisan and stretching this to the testimony of the sister and step mother of the accused and even to the lady who said that she care of the mother during her lifetime, there was still the testimony of the neighbour which could not be considered to be anything other than independent. It is true she had the same surname as the accused but that could hardly label her as being partisan. Ng is a very common surname. This witness in no way contradicted herself nor was she broken in cross-examination. I accepted her as a witness of truth. Inspector Sahat the investigating officer said that he went to the house of the immediate neighbour to enquire whether the accused's house was occupied by any person than himself, his wife and the little girl but could not remember whom he met. He did not write all this in his investigation diary. He felt it was necessary to record it in his diary but since the neighbour said that he did not know anything, he, Inspector Sahat, did not enter it so. In addition to that it is always a hazard to witnesses giving false testimony that the greater number called the greater the likelihood of their contradicting one another. In this case there was no such contradiction. None of the defence witnesses though challenged and pressed were broken down in cross-examination. ASP Ismail had testified that bedrooms C & D in the house did not appear to be occupied. This was denied by the accused and certain defence witnesses. The police photographer was present in the house on 14 October 1986 when the accused were arrested. He took photographs of the hall but not of the bedrooms. Thus the Court was deprived of the opportunity of observing and ascertaining for itself whether either or both these rooms showed signs of recent occupation, especially so when ASP Ismail himself admitted that room D, which the defence claimed was occupied by Ah Lok and Lai Heong, had a double bed and other furniture and that there were men's and women's clothes therein. In the circumstances I was not prepared to accept the prosecution evidence in the testimony of the defence witnesses, this being a criminal case necessitating proof by the prosecution of their case beyond all reasonable doubt as against the requirement of the defence to establish a story which was reasonably probable.

The police officers who testified for the prosecution claimed that from the time they arrived at the house of the accused on 14 October 1986 and throughout their stay there, there was no question of an old lady being present. On the other hand the accused and his wife insisted that the mother of the accused was present and, what is more, arrested, taken to the police station and subsequently released. Other defence witnesses corroborated the defence story in one or more respects. The defence story was that the accused's mother was living with him in the house at the time of arrest and had been doing so for several months prior thereto. In this regard there was independent testimony of not only the neighbour but also that of the prosecution witness, the landlord, who testified to seeing the accused's mother in the house about 4 times. There was also a clash in versions as to who discovered the drugs. ASP Ismail claimed that he did. The accused testified that when the drugs were found he and ASP Ismail were in the kitchen of the house. In this regard and indeed in respect of the whole case I had in mind that I did not have to believe the explanation of the accused but simply to consider whether the evidence raised in my mind a reasonable doubt as to his guilt. See *Mat v. Public Prosecutor* [1963] MLJ 263. It was significant that despite Detective Corporal Rashid, Detective Corporal Jayarajan and Woman Constable Maziah being present in the house at the material time none of them was called to testify for the prosecution although they and a number of others were offered to the defence as witnesses.

When the defence was called, Counsel for the accused applied under s. 51 of the Criminal Procedure Code for production of any statement made by Corporal Rashid in respect of the current case, citing as authority the case of *Public Prosecutor v. Raymond Chia Kim Chwee & Anor*. [1985] CLJ (Rep) 260. I was not sure of the extent to which the discretion of the Court should be exercised when applying the powers granted by s. 51. I therefore informed Counsel on both sides that I needed the matter to be researched. No further authorities were forthcoming. Counsel for the accused apparently withdrew his application and the case proceeded without Detective Corporal Rashid or any other witnesses offered by the prosecution being called by the defence. I did not hold this fact against the defence for it is clear that the provisions of s. 114(g) cannot be invoked against an accused person or for that matter failure to call any witnesses made the subject of comment to the jury at a jury trial. See *Illian & Anor. v. Public Prosecutor* [1988] 1 MLJ 421 at p. 424.

A point of salient importance which was not touched on by either the prosecution or the defence was this. The wife in her cautioned statement, which was part of the prosecution case, and in this regard see the cases of *Wong Chooi v. Public Prosecutor* [1967] 2 MLJ 180 and *Public Prosecutor v. Mohamed Noor Jantan* [1979] 2 MLJ 80, said that she returned home from Johor Bahru on 14 October 1986 at about 7.15 at night. When the police arrived with her husband at about 9.30 that evening the child was in the house. Thus there was a strong probability that the child was in the house when the mother came back or if the child was not there then, she was brought to the house before the police arrived with her father. Two questions arise. If the child was in the house when the mother arrived who was with the child? If the child was brought home subsequently who brought the child back? As evidenced by her birth certificate the child was born on 14 January 1984. On 14 October 1986 she would have been 2 years and 9 months old. Again a strong probability is that if the child was at home when the mother arrived there must have been an adult person in the house taking care of her. Likewise she would have been in the charge of an adult if she was brought home subsequently. Who was the person taking care or charge of the child as indicated? Could it have been the mother of the accused? Or was it Ah Kok and Lai Heong or either of them? If not who else could it have been? It could have been the accused. One would have to infer. But the law is that where there is more than one inference which can

reasonably be drawn from a set of facts in a criminal case, the inference most favourable to the accused should be adopted. See *Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ Supp. 105 at p. 108. Furthermore several defence witnesses testified to the accused entertaining friends in his house, playing mahjong and so on. Again, even if these defence witnesses could be said to be partisan, there was the evidence of the prosecution witness namely the landlord who confirmed that on the 2 or 3 occasions when he visited the house he saw friends of the accused therein. Inspector Sahat, the investigating officer in this case, testified that the tricycle being in the hall was open to access by anyone occupying the house. Thus it could not be said that the accused had exclusive possession of the drugs found in the container of the tricycle. Similarly Inspector Sahat testified that the empty plastic packets on top of the refrigerator in the kitchen were accessible to anyone occupying the house.

When the accused and his wife were taken to the police station following their arrest at the house of the accused nail clippings from all their fingers were taken and sent to the chemist for examination but were found to be devoid of the presence of heroin. There was no evidence of anything incriminating in regard to the clippings. If anything, this aspect of the case was yet another factor pointing to the innocence of the accused.

Having considered the evidence adduced by the prosecution, the testimony of the accused and that of his witnesses I came to the conclusion that the defence story that there were a number of occupants in the house at the material time, that the drugs found in the tricycle were not the property of the accused, that he was not in possession of the drugs and had no knowledge of the same, that the drugs could have been the property or in the possession of one or more of the occupants of the house or anyone else was reasonably probable and there was reasonable doubt in regard to the guilt of the accused. Accordingly I give the benefit of that doubt to the accused. He is therefore acquitted and discharged.

Also found at [1990] 1 CLJ 1195